SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 101

WILLIAM VINCENT VITARELLI, PETITIONER,

vs.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, HARRIS ELLSWORTH, CHAIRMAN OF THE CIVIL SERVICE COMMISSION OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

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PETITION FOR CERTIORARI FILED JUNE 12, 1958
CERTIORARI GRANTED OCTOBER 27, 1958

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM VINCENT VITARELLI, Plaintiff,

—v.—

FRED A. SEATON, Secretary of the Interior of the United States, Washington 25, D.C.; PHILIP YOUNG, Chairman, GEORGE M. MOORE, and FREDERICK J. LAWTON, Members of the Civil Service Commission of the United States, Washington 25, D.C., Defendants.

[fol. 11] APPENDIX B TO APPELLANT'S BRIEF

Newspaper clipping from Guam Daily News, dated Saturday, March 13, 1954—Vol. X No. 62.

SECURITY PROBE IN TRUST ISLES

FIVE EMPLOYEES WILL BE OUSTED AS "BAD RISKS"

Five Trust Territory personnel with several years service in the area are to be asked to resign as "security risks," Trust Territory High Commissioner Frank Midkiff confirmed yesterday.

Midkiff said the five are "scattered in various districts" of the Trust Territory and are the only ones of the 242 Americans employed in the territory to be under suspicion.

In almost every case, he said, the suspect will be permitted to resign, unless he chooses to fight. At least one has intimated he will demand a further hearing, Midkiff said.

Allegations are based on activities before coming to the territory, he continued and the suspects have been here "two or three years."

Midkiff stressed that the loyalty and patriotism of the five are not at issue.

"I doubt very much," he said firmly, "that any of them were mixed up with the Communist Party in the past."

Obviously disturbed by his distasteful chore of asking the resignations during his current tour of the islands and hesitant to discuss details of individual cases, Midkiff attributed his mission to the federal government's security program.

"Security due to the pressure of Communism is of increasing concern to our government," he said, choosing his words carefully.

"The President has ordered a new look through all departments of the government, particularly in any sensitive areas and positions to make sure they are safe and that no undue chances are being taken.

"There have not been very many new cases found—only a few, according to the President.

"The security section of each department in the government has restudied all cases, made their own decisions and reported to the secretaries of the departments, who have taken action.

"It is an attempt to be unusually cautious because of the new and mounting steps in international tension," he said.

He gave as an example of a security risk a known conscientious objector, saying that an advocate of pacifism is out of place in so sensitive and strategic an area as the trust territory.

"There is no question of disloyalty," he repeated.

Saying that it was an extremely difficult subject for him to discuss, Midkiff concluded:

"There are many conscientious and able people who, not because of their disloyalty or lack of patriotism, are judged best located elsewhere than in some possibly very sensitive area."

Asked if this meant the five would be relocated within the department of interior, Midkiff said sadly that he doubted it, because of the recent reductions in force for budgetary reasons.

[fol. 12] UNITED STATES DEPARTMENT
OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

PERSONAL

Registered Mail
Return Receipt Requested
Air Mail

Memorandum

To: Mr. William Vincent Vitarelli
Education and Training Specialist
Office of the High Commissioner
Trust Territory of the Pacific Islands
Honolulu, T. H.

From: The Secretary of the Interior

Subject: Suspension under Executive Order 10450 and Public Law 733, and Department Order 2738

1. By virtue of the authority vested in me by Executive Order 10450 dated April 27, 1953 (18 F. R. 2489) and the Act of August 26, 1950, (5 U.S.C., 1946 ed., Supp. V, Sec. 22-1 *et seq.*) as implemented by Department Order 2738, you are hereby notified that you are suspended from duty without pay and such suspension shall be effective at the close of business of the 2d day of April, 1954.

2. The reasons for your suspension and the charges against you, which are as specific as security interests permit, are as follows:

(a) That during the years 1941 to 1945, inclusive, but not limited thereto, you were either a member of, affiliated with, or in sympathetic association with the Communist Party, and members of the Communist Party, including but not limited to the following particulars as to such affiliation and sympathetic association, to-wit:

(1) During the years 1941 to 1945, inclusive, but not limited thereto, you were in sympathetic association with persons who were members of, affiliated with,

or in sympathetic association with the Communist Party, including but not limited to the following named persons, to-wit: F---, also known as F---; W---; and W---, also known as W---.

[fol. 13] (2) In the year 1945 while you were a resident of New York City you registered a preference for the American Labor Party; the American Labor Party within New York City has been cited as being under the domination and control of the Communist Party or members thereof by a Special Committee on Un-American Activities of the House of Representatives of the United States, and by the State of California Committee on Un-American Activities.

(3) In your answer under oath of October 13, 1952, to the then Interior Department Loyalty Board you stated in effect that during the time you were teaching at Teachers College of Columbia University you subscribed to the USSR Information Bulletin and that you (and others interested) brought copies of the Daily Worker and of the New Masses.

The USSR Information Bulletin is the official publication of the Government of Soviet Russia and the Daily Worker and the New Masses are Communist publications which have been cited numerous times by the Special Committee on Un-American Activities of the House of Representatives of the United States.

It is noted that you also stated in connection with the above that bulletins from numerous other nations and many other publications were taken or procured and that the purpose of all the publications was to have on hand information about various countries of all political orientations. The purpose of this paragraph is to present the facts in connection with all of said publications and allow an inquiry into the purpose of the same.

(4) In your said answer under oath of October 13, 1952, hereinabove mentioned, you stated with regard to your acquaintance and association with the said F--- and the said W---, hereinabove named, in brief

as follows: Re F---; that you were not certain of his identity but believed he was the person you met in Georgia as F--- and that you would extend as much [fol. 14] information as you could remember about F---. This information was to the effect that you were introduced to Mr. F---, may have had another personal contact with him, but were not sure, and had a faint recollection that you may have written him one letter, but that your association with him was rather casual and short lived, and that you never knew he was connected with any Communist front; Re W---; That you did know Mr. W--- and had several visits and associations with him solely as a professional matter, as detailed in your said answer; and no other associations with him, but you never knew he was a member of or a leader in the Communist Party.

As to these associations it is alleged: That in fact your associations with the said F--- were not fully divulged by you and that same were not casual but on the contrary were the associations of an intimate friendship; that in fact your associations with the said W--- were not fully divulged by you in that such associations were not solely connected with your teaching profession; and that you did know that both the said F--- and the said W--- were members of, affiliated with, or in sympathetic association with the Communist Party and numerous Communist front organizations.

(b). The Communist Party is a totalitarian and subversive organization which has adopted, maintained, and showed a policy of advocating or approving the commission of acts by force or violence to deny persons their rights under the Constitution of the United States and which has sought and now seeks to alter the form of the government of the United States by unconstitutional means. The Communist Party has been designated by the Attorney General of the United States as being within the purview of section 8(a)(5) of Executive Order 10450.

[fol. 15] 3. Your behavior, activities and associations tend to show that you are not reliable or trustworthy, and

the facts above alleged furnish reason to believe that you have deliberately misrepresented, falsified or omitted material facts in connection with your said behavior, activities and associations, and these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security.

4. You are hereby advised of your right and opportunity to submit any statements, answer, or affidavits to the Secretary of the Interior within 30 days after receipt of this notice to show why you should be reinstated or restored to duty. All such statements, answer, and affidavits should be sworn to under oath and it should be noted that any deliberate misrepresentations, falsifications, or omission of material facts may constitute sufficient basis for removal. You may also request a hearing before a board duly constituted for that purpose. I will review and consider such statements, answer, and affidavits, if any are submitted by you, and the recommendation of the hearing board if a hearing is requested, and within 30 days thereafter you will be notified of my decision to either terminate your employment if I shall determine that such termination is necessary and advisable in the interests of the national security of the United States, or to reinstate you to your former employment. If you are reinstated you shall be allowed compensation for all of the period of your suspension, but the amount shall not exceed the difference between the amount you would normally have earned during the period of suspension at the rate you were receiving on the date of your suspension and your interim net earnings.

5. There is enclosed a copy of Departmental Order No. 2738 to which are attached copies of Executive Order 10450 and Public Law 733 (The Act of August 26, 1950).

/s/ Douglas McKay
Secretary of the Interior

Enclosure

[fol. 21]

Joint Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2870-56

WILLIAM VINCENT VITARELLI, Erwinna, Pennsylvania,
Plaintiff,

—against—

FRED A. SEATON, Secretary of the Interior of the United States, Washington 25, D.C.; PHILIP YOUNG, Chairman, GEORGE M. MOORE, and FREDERICK J. LAWTON, Members of the Civil Service Commission of the United States, Washington 25, D. C., Defendants.

COMPLAINT FOR A DECLARATORY JUDGMENT AND INJUNCTION
—Filed July 10, 1956

Plaintiff, appearing herein by his attorney, Clifford J. Hynning, for his complaint against the defendants, respectfully alleges as follows:

First. This is a civil action for a declaratory judgment and other equitable relief to restore plaintiff to employment in the Education Department of the Trust Territory of the Pacific Islands, Department of the Interior. This action arises under the Constitution and laws of the United States and involves a matter in controversy, exceeding the sum or value of $3,000.00, exclusive of interests and costs.

Second. Jurisdiction of this Court over the subject matter is founded upon United States Code, Title 28, Sections 1331, 1332, 2201, and 2202, United States Code, Title 5, Section 22-1 and 1009, and District of Columbia Code, Sections 11-305, and 11-306. Jurisdiction is also based on the Fifth Amendment to the Constitution of the United States and on Articles I and III thereof.

[fol. 22] Third. Plaintiff is a citizen of the United States and a citizen of Pennsylvania residing in Erwinna, Bucks County, in the Eastern District of Pennsylvania, and brings this action in his own right.

Fourth. Defendant Fred A. Seaton is Secretary of the Interior of the United States of America, who has adopted or continues the actions of his predecessors in the suspension and removal of plaintiff from, and the refusal to restore plaintiff to, his position in the Department of the Interior, as herein alleged, and is hereinafter called "defendant Secretary." The official residence of defendant Secretary is in the District of Columbia.

Fifth. Defendants Philip Young, George M. Moore, and Frederick J. Lawton are members of the United States Civil Service Commission, hereinafter called "defendant Commissioners." The official residence of each of them is in the District of Columbia.

Sixth. On August 6, 1951, plaintiff was employed by the Department of the Interior pursuant to Civil Service Regulation 6.101(lr), Schedule A; he acquired the right to this employment by meeting the requirements of said regulation; and, having completed his trial period, he became an employee holding an "indefinite appointment" within the meaning of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. Code 22-1, hereinafter called the "Act of August 26, 1950").

Seventh. Plaintiff was employed as education and training specialist in Koror, Western Caroline Islands, of the Trust Territory of the Pacific Islands, Department of the Interior, and his duties consisted of administering and fostering an educational program for the native people of the Palau District of the Trust Territory, including teacher training and the preparation of teaching materials. At time of suspension, plaintiff received a salary of $6,140 per year, plus 25% overseas differential.

[fol. 23] Eighth. Plaintiff's position in the Department of the Interior was at no time a "sensitive" position, whether by official designation of the Department of the Interior under Sec. 5(a) of the Departmental Security

Regulations (Order No. 2738, dated November 9, 1953) or by the nature of plaintiff's duties, which did not put him in contact with, or give him access to, authorized or unauthorized, any "confidential" or "secret" or "classified" information or material; nor was he in a position to influence action or policy against the interests of the Government of the United States, or otherwise to aid or assist internal subversion or foreign aggression against the United States; and plaintiff was not subject to the summary removal powers under the Act of August 26, 1950.

Ninth. Plaintiff has, at all times, rendered full and completely satisfactory service in his position as education and training specialist, as aforesaid, has received official ratings of "excellent," and has secured favorable commendations from his superiors.

Tenth. Plaintiff is and has always been completely and unswervingly loyal to the Government of the United States, and defendant Secretary has so conceded on the record through the departmental security officer.

Eleventh. On or about April 3, 1954, plaintiff received in Koror a dispatch from the High Commissioner of the Trust Territory together with an abstract of a letter from defendant Secretary suspending plaintiff (omitting the charges) as of the close of business on April 2, 1954, which date was later extended to April 5, 1954. On or about April 8, 1954, plaintiff received a registered air mail letter from defendant Secretary notifying plaintiff of his suspension and setting forth the charges against plaintiff. Defendant Secretary also advised plaintiff of his right to answer and request a hearing within 30 days after the receipt of the letter.

[fol. 24] Twelfth. Plaintiff immediately requested travel authority from Koror to Washington, D. C., but was informed by a dispatch from the High Commissioner of the Trust Territory that he was "not entitled travel at Government expense unless resigning." Plaintiff was subsequently authorized to travel, and proceeded to Washington, D. C., for the purpose of preparing an answer to the charges. Plaintiff perforce left his wife and four children

in Koror where they remained separated from plaintiff by thousands of miles for many months, dependent upon such funds as plaintiff could send from his scanty earnings on odd jobs which he secured while preparing his defense to the charges, attending the hearings, and waiting for the judgment of defendant Secretary, with all the attendant difficulties of familial communications over such geographical distances during such trying days for plaintiff. After plaintiff's removal as a so-called "security risk" by order of defendant Secretary, as hereinafter alleged, the government at long last provided transportation for the return of plaintiff's wife and four children to the United States.

Thirteenth. Plaintiff filed with defendant Secretary a written answer, together with 44 affidavits concerning his loyalty and character. On June 11, 1954, defendant Secretary informed plaintiff that the answer and supporting documents "do not constitute sufficient grounds to reinstate" plaintiff.

Fourteenth. On June 22, and July 1, 1954, plaintiff, together with counsel, appeared before a so-called security hearing board, which consisted of three members drawn from the Departments of Commerce, Justice and Agriculture. No evidence or testimony was adduced at this hearing on behalf of the Department of the Interior. Plaintiff was not confronted with any witnesses against him and did not have the right to subpeona (sic) witnesses. Therefore, he could not cross-examine his accusers or answer or rebut their statements against him. Nor was he given the text of the statements that had been made against him. In his testimony plaintiff categorically denied membership in or affiliation or sympathetic association with the Communist Party or its sympathetizers (sic) and gave [fol. 25] a complete, candid and factual explanation of all the matters contained in the written charges. The security officer of the Department of the Interior conceded on the record that plaintiff's loyalty was not in issue. In addition, four witnesses testified on plaintiff's behalf.

Fifteenth. By letter dated September 3, 1954, plaintiff received from the Director of the Office of Trust Terri-

tory, a copy of "Findings and Final Determination" by defendant Secretary, dated September 2, 1954, in which defendant Secretary found "it advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954, "without stating which of the charges were sustained against plaintiff. Nor did these purported findings state that plaintiff held a "sensitive position" in the Department of the Interior. Plaintiff's employment was terminated as of the close of business on September 10, 1954.

Sixteenth. Plaintiff has received several conflicting official explanations why he was suspended and removed as a "security risk" from his position in the Department of the Interior. He learned of his probable suspension through an announcement to the press on March 12, 1954, by the High Commissioner of the Trust Territory of the Department of the Interior who stated in Guam that five Trust Territory employees were officially to be asked to resign as "security risks" and identified one of them as a "known conscientious objector, saying that an advocate of pacifism is out of place in so sensitive and strategic an area as the Trust Territory." This public reference was to plaintiff whose pacifism was known. This official press announcement also conflicts with the fact that plaintiff's position has never been designated as "sensitive" by the Department of the Interior, as hereinbefore alleged.

[fol. 26] Seventeenth. An entirely different explanation was officially given plaintiff by defendant Secretary in the letter of removal, which, by referring to the letter of charges, indicated that plaintiff was removed because of his associations prior to his employment by the Department of the Interior.

Eighteenth. Another entirely different explanation was officially given plaintiff's original counsel (who remains of counsel) by the Solicitor of the Department of the Interior to the effect that plaintiff had been removed because of an investigative report which had been received in the

Department of the Interior after the filing of the letter of charges and which was not necessarily reflected in the letter of charges.

Nineteenth. Another entirely different explanation was given plaintiff's original counsel by the personnel officer for the Trust Territories of the Department of the Interior to the effect that plaintiff had not been removed for any subversive association or activity, as implied in the explanation set forth in paragraph seventeenth above, but because plaintiff had exhibited "lack of common sense" during his employment by the Department of the Interior in the South Pacific.

Twentieth. On the basis of the allegations in paragraphs sixteenth through nineteenth, plaintiff avers that certain persons in the Department of the Interior desired to oust plaintiff; that the so-called security proceedings against him were brought for this purpose and not for the reasons set forth in the letter of charges; and that efforts were officially made to force plaintiff to resign by threats not to give him transportation to the mainland where he could defend himself and by threats not to pay the cost of bringing his wife and four children home for many months during which period plaintiff received no pay or allowances.

[fol. 27] Twenty-first. By petition, presented to defendant Secretary on October 25, 1955, plaintiff applied for reinstatement or rehearing. This petition resulted in the taking of certain testimony on November 14, 1955, of the personnel officer of the Trust Territories of the Department of the Interior. This petition was denied by defendant Secretary on May 11, 1956.

Twenty-second. On June 12, 1956, plaintiff by his attorney made a written demand upon defendant Secretary to restore him to duty forthwith in accord with the decision of the Supreme Court in *Cole* v. *Young*, but defendant Secretary has so far failed to comply with this demand.

Twenty-third. Plaintiff has exhausted all the remedies available to him under applicable administrative procedures and has no adequate remedy at law other than the

instant action, under the jurisdiction conferred upon this Court, for the irreparable damage he has suffered and continues to suffer as a result of the unlawful and unconstitutional acts of defendants which acts branded plaintiff as a "security risk" as hereinbefore alleged, have caused him to lose his employment and have resulted in a continuing injury to his reputation and to his health.

Twenty-fourth. Plaintiff's suspension and removal as a "security risk" under Executive Order 10450 was in violation of the Act of August 26, 1950, and the Lloyd-LaFollette Act (5 U. S. C. 652 (a)) in that the aforesaid executive order and the applicable regulations of the Department of the Interior adopted pursuant thereto, purported to establish a universal standard—"clearly consistent with the interests of the national security"—to be applied to all agencies and to all positions in each agency without regard to the fact that plaintiff's position had not been officially determined to be "sensitive" by the Department of the Interior, as aforesaid, nor was his position concerned with activities relating to the Nation's safety or to the "national security" as that standard was used in the Act of August 26, 1950.

[fol. 28] Twenty-fifth. Plaintiff's suspension and removal as a "security risk" were not authorized by law in that the statement of charges was not worded with sufficient specificity as to be meaningful to plaintiff or to enable him, on the assumption of innocence, to prepare an effective answer, and such charges were fatally vague and indefinite and worded in several alternatives, without specifying the times, places, or events concerning which plaintiff was alleged not to have told the truth, in violation of the Act of August 26, 1950, and the "due process clause" of the Fifth Amendment to the Constitution of the United States.

Twenty-sixth. Plaintiff's removal was not authorized by law in that he was not accorded a fair and impartial hearing in June, 1954. The failure of defendant Secretary to afford plaintiff a fair hearing is further evidenced by the facts of record in the transcript of the proceedings before the so-called security hearing board which wandered far afield, without any discernible standards of relevancy

or materiality, from the matters set forth in the letter of charges. In particular, plaintiff was examined on whether he thought the security program was a Republican plot to get rid of Democrats, on his views on racial segregation, on discrimination against Jews at Columbia University, on methods of pricing cotton in Georgia, on whether he had "heard" of a great variety of organizations which were not listed in the letter of charges, on whether Bucks County in Pennsylvania is a "depressed-area", on "Black Mountain transcendentalism," whatever that may be, on whether he voted for Henry Wallace in 1940 (for the vice presidency), on whether he "was quite hepped up over the one-world idea" and whether he "was still (i.e., June, 1954) a strong advocate of the United Nations."

Twenty-seventh. Plaintiff's removal was not authorized by law in that the so-called security hearing board failed to accord plaintiff "fair, impartial and equitable treatment", as required by the Civil Service Handbook Guide for Members of Security Hearing Boards under Executive [fol. 29] Order 10450, and failed to exercise an independent judgment with respect to the kinds of information to be withheld from plaintiff under the guise of "classified matter" by the security officer of the Department of the Interior whose determinations in this regard were regarded as final and binding upon the said board. By so limiting itself, the said board completely failed to function as an impartial agency authority to hear and judge between the contentions of the security officer of the Department of the Interior and the evidence presented on behalf of plaintiff, in violation of the Act of August 26, 1954, and the "due process" clause of the Fifth Amendment to the Constitution of the United States.

Twenty-eighth. The so-called security hearing board and defendant Secretary assumed the accuracy of the so-called "confidential file" and assumed that plaintiff's testimony in variance therewith, if there were a variance, showed plaintiff to be untruthful and unreliable, and failed to reach an independent judgment with respect thereto, in violation of the Act of August 26, 1950, and the due process clause

of the Fifth Amendment to the Constitution of the United States.

Twenty-ninth. Nothing in the so-called "confidential file" on plaintiff is believed genuinely to bear upon the "interests of the national security", as that standard is used in the Act of August 26, 1950. On the contrary, it is believed that the said file, if it exists, consists solely of unsworn and unsubstantiated statements by persons who, if identified, would fear to confront plaintiff and submit to cross-examination; and consequently the so-called "classified file," if it exists, was withheld from plaintiff in violation of the Act of August 26, 1950, Executive Order 10450 and the departmental security regulations in pursuance thereto.

Thirtieth. The removal of plaintiff by defendant Secretary, as aforesaid, was arbitrary and capricious and in further violation of the "due process" clause of the Fifth Amendment to the Constitution of the United States, in that there was no evidence of record to support the finding [fol. 30] of the so-called security hearing board and defendant Secretary considered—as against the sworn testimony of plaintiff and his witnesses and affidavits of plaintiff's witnesses, which attested to the facts of plaintiff's complete and unswerving loyalty to the United States Government—so-called "confidential information" based on statements of so-called "confidential informants," none of which information was disclosed under oath, and said board and defendant Secretary did not know of the circumstances surrounding such information, which would be relevant to an evaluation of the reliability or credibility of said "confidential informers" and said "confidential information."

Thirty-first. The removal of plaintiff by defendant Secretary, as aforesaid, was in violation of the Act of August 26, 1950, in that plaintiff was never furnished with the written statement of the decision of defendant Secretary as required under that Act, nor did any decision purporting to remove plaintiff inform him as to what specific charge, if any, had been used as a basis for the removal of plaintiff "in the interests of the national security"; and such pur-

ported action of defendant, as aforesaid, was taken in violation of the "due process" clause of the Fifth Amendment to the Constitution of the United States, in that plaintiff was never furnished with a copy of the findings and conclusions of the so-called security hearing board.

Thirty-second. The removal of plaintiff by defendant Secretary, as hereinbefore alleged, has deprived plaintiff of his employment and compensation since on or about April 5, 1954, and thereby deprived plaintiff of liberty and property without due process of law, and the resulting actions by defendant Secretary and defendant Commissioners have branded him with "a badge of infamy" as a risk to the security of his country, arbitrarily and capriciously, without basis in fact, without a fair hearing or procedure, and constitute official defamation of plaintiff without probable cause. By reason thereof, as herein set forth, plaintiff's reputation as a professional educator has been destroyed and it has become virtually impossible for him to obtain employment in his field of training.

[fol. 31] Thirty-third. Defendant Secretary has refused and continues to refuse to restore plaintiff to his position with the Department of the Interior, as aforesaid; and defendant Commissioners have listed plaintiff's name on the civil-service rolls as a person who has been removed as a "security risk" after a hearing pursuant to Executive Order 10450.

Thirty-fourth. By reason of the premises, plaintiff is entitled to relief against defendant.

Thirty-fifth. No prior application for this or any other relief has been made to this or any other Court.

Wherefor plaintiff prays for the following relief:

1. That the actions of defendant Fred A. Seaton, Secretary of the Interior, and his predecessor, in suspending and removing plaintiff from his employment in the Department of the Interior on or about September 10, 1954, be set aside and declared null and void and illegal and in violation of the Act of August 26, 1950; in violation of the Lloyd-LaFollette Act (5 U. S. C. 652 (a)); in violation of Execu-

tive Order 10450 and the security regulations of the Department of the Interior adopted pursuant thereto insofar as they are here applicable; in violation of the Fifth Amendment to the Constitution of the United States and Articles I and III thereof; and that defendant's actions be declared arbitrary and capricious.

2. That Executive Order 10450 as amended, and the security regulations of the Department of the Interior pursuant thereto, be declared unconstitutional and of no effect as applied to plaintiff in that said Executive Order and said regulations abridge plaintiff's rights under the Fifth Amendment to the Constitution of the United States and Articles I and III thereof.

3. That a mandatory injunction issue directing:

(a) Defendant Fred A. Seaton, Secretary of the Department of the Interior, his deputies, agents, attorneys and all those acting under or in concert with him, to reinstate and restore plaintiff to the position held by him at the time of his suspension on April 2, 1954, with all the rights [fol. 32] and status which he then had and which would have accumulated to the date of such reinstatement and restoration had he not been unlawfully discharged, and that plaintiff receive all salary and compensation which he would have received from the date of his unlawful suspension to the date of such restoration, in accord with the provisions of the Act of August 26, 1950.

(b) Defendants Philip Young, George M. Moore, and Frederick J. Lawton, members of the United States Civil Service Commission, to restore plaintiff to the place on all civil-service lists which he had immediately prior to his unlawful suspension with all the rights and status he then had and which would have accumulated had he not been unlawfully suspended and removed.

(c) Defendants Fred A. Seaton, Secretary of the Interior, and Philip Young, George M. Moore, and Frederick J. Lawton, members of the United States Civil Service Commission to expunge all records in their possession, custody, or control relating to plaintiff's discharge and of all pro-

ceedings thereto; and to refrain from interfering in any way with plaintiff's full reinstatement and restoration to his position in the Department of the Interior.

4. That plaintiff be granted such other and further relief as the Court shall deem proper.

/s/ Clifford J. Hynning, Attorney for Plaintiff.

Of Counsel
Allen S. Olmsted, 2nd, Saul, Ewing, Remick & Saul, 2301 Packard Building, Philadelphia 2, Pa.

[fol. 33]

IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed September 10, 1956

Now come the defendants, Fred A. Seaton, Secretary of the Interior of the United States, Philip Young, Chairman, George M. Moore, and Frederick J. Lawton, Members of the Civil Service Commission of the United States, and in answer to the complaint say as follows:

First Defense

1. Answering paragraph 1 of the complaint, defendants deny the allegations contained therein.

2. Answering paragraph 2 of the complaint, defendants deny the allegations contained therein.

3. Answering paragraph 3 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the allegations contained therein.

4. Answering paragraphs 4 and 5 of the complaint, defendants admit the allegations contained therein.

6. Answering paragraph 6 of the complaint, defendant Secretary of the Interior denies the allegations contained therein, except that he admits that on August 6, 1951, plaintiff was appointed by the Department of the Interior under Civil Service Commission Regulation 6.101(h) which does not confer competitive civil service status. A certified copy of plaintiff's Standard Form 50 relating to his appointment is attached hereto.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 6.

7. Answering paragraph 7 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 7.

[fol. 34] 8. Answering paragraph 8 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 8.

9. Answering paragraph 9 of the complaint, defendant Secretary of the Interior denies the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9.

10. Answering paragraph 10 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to plaintiff's loyalty to the United States, except that Defendant Secretary of the Interior denies that plaintiff's loyalty has been conceded on the record. Defendant Secretary of the Interior states that on October 21, 1952, the Interior Department Loyalty Board, pursuant to E. O. 9835, found that there was no reasonable doubt as to plaintiff's loyalty.

11. Answering paragraph 11 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 11.

12. Answering paragraph 12 of the complaint, defendant Secretary of the Interior admits that plaintiff re-

quested travel authority from Koror to Washington, D. C., that he was at first informed that he was not entitled to travel at Government expense unless resigning, that plaintiff was subsequently authorized to travel, and that transportation at Government expense was also provided for plaintiff's family. Defendant Secretary of the Interior states that he is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 12.

[fol. 35] Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12.

13. Answering paragraph 13 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13.

14. Answering paragraph 14 of the complaint, defendant Secretary of the Interior admits that on June 22 and July 1, 1954, plaintiff together with counsel appeared before a security hearing board which consisted of three members drawn from the Departments of Commerce, Justice and Agriculture. Defendant Secretary of the Interior further admits that at the hearing plaintiff was not confronted with any witnesses against him, that four witnesses testified in plaintiff's behalf, and that the contents of confidential information concerning plaintiff were not disclosed to him. Except to the extent hereinbefore admitted, defendant Secretary of the Interior denies the allegations of paragraph 14.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 14.

15. Answering paragraph 15 of the complaint, defendant Secretary of the Interior admits the allegations contained therein, except that he denies that the findings by the Secretary of the Interior were "purported" findings.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 15.

[fol. 36] 16. Answering paragraph 16 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief, except that defendant Secretary of the Interior denies that plaintiff was given conflicting official explanations of his removal.

17. Answering paragraph 17 of the complaint, defendant Secretary of the Interior denies the allegations contained therein, except that he admits that in his letter of September 2, 1954, containing his Findings and Final Determination he stated that: "I find it advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954."

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 17.

18. Answering paragraph 18 of the complaint, defendant Secretary of the Interior denies the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained therein.

19. Answering paragraph 19 of the complaint, defendant Secretary of the Interior denies the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained therein.

20. Answering paragraph 20 of the complaint, defendant Secretary of the Interior denies the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained therein.

21. Answering paragraph 21 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

[fol. 37] Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 21.

22. Answering paragraph 22 of the complaint, defendant Secretary of the Interior admits the allegations contained therein.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 22.

23. Answering paragraph 23 of the complaint, defendants admit that plaintiff has exhausted all the remedies available to him under applicable administrative procedures. Defendants deny that plaintiff has no legal remedy other than the instant action under the jurisdiction conferred by this court, inasmuch as the Court of Claims has jurisdiction to consider plaintiff's claim for back pay. Defendants further deny that any acts of theirs in connection with plaintiff's suspension and discharge were unlawful or unconstitutional. Defendants state that they are without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 23.

24. Answering paragraph 24 of the complaint, defendants deny the allegations contained therein, except that defendant Secretary of the Interior admits that plaintiff's position was not officially designated as sensitive by the Department of Interior.

25. Answering paragraph 25 of the complaint, defendants deny the allegations contained therein.

26. Answering paragraph 26 of the complaint, defendants deny the allegations contained therein, except that defendant Secretary of the Interior admits that at the hearing plaintiff was queried as to his background, habits, activities, attitudes, associations, trustworthiness, reliability, and discretion, which examination included the matters set forth in the last sentence of paragraph 26 of the complaint.

27. Answering paragraph 27 of the complaint, defendants deny the allegations contained therein.

[fol. 38] 28. Answering paragraph 28 of the complaint, defendant Secretary of the Interior denies the allegations contained therein but alleges that he relied upon the whole record in the case, including confidential information.

Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 28.

29. Answering paragraph 29 of the complaint, defendants deny the allegations contained therein except that defendants state that they are without knowledge or information sufficient to form a belief as to what "is believed" in connection with the contents of the confidential file.

30. Answering paragraph 30 of the complaint, defendants deny the allegations contained therein except that defendant Secretary of the Interior admits that confidential information was considered in connection with the charges issued against plaintiff, and that plaintiff was not confronted with or given an opportunity to cross-examine Government informants.

31. Answering paragraph 31 of the complaint, defendants deny the allegations contained therein.

32. Answering paragraph 32 of the complaint, defendants deny the allegations contained therein except that defendants state that they are without knowledge or information sufficient to form a belief as to plaintiff's reputation or employment opportunities.

33. Answering paragraph 33 of the complaint, defendant Secretary of the Interior admits that he has refused to restore plaintiff to employment in the Department of the Interior. Defendant Commissioners state that they are without knowledge or information sufficient to form a belief as to this allegation.

Further answering the allegations of paragraph 33, defendant Commissioners deny that plaintiff's name has been listed on any civil service rolls as a security risk discharge. Defendant Secretary of the Interior states that he is with-

out knowledge or information sufficient to form a belief as to this allegation.

[fol. 39] 34. Answering paragraph 34 of the complaint, defendants deny the allegations contained therein.

35. Answering paragraph 35 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the allegations contained therein.

Additional Defenses

Second Defense

The complaint fails to state a claim upon which relief may be granted.

Third Defense

The court is without jurisdiction of the subject matter of this action in that the plaintiff seeks to subject to judicial review executive action which is committed by law to the sole and exclusive discretion of the executive.

Fourth Defense

The actions of the defendants complained of herein were neither arbitrary, capricious, nor an abuse of discretion.

Fifth Defense

Even if plaintiff's discharge be held to be invalid, plaintiff may not be reinstated since he was appointed subject to a two-year employment agreement which terminated on September 10, 1954.

Wherefore, defendants pray that the complaint be dismissed with costs to the defendants.

/s/ George Cochran Doub, Assistant Attorney General, /s/ Edward H. Hickey, Attorney, Department of Justice, /s/ Donald B. MacGuineas, Attorney, Department of Justice, /s/ Beatrice M. Rosenhain, Attorney, Department of Justice.

[Certificate of Service]

[Certificate of Mailing]

[fol. 40]

IN THE UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT—Filed September 13, 1956

Come now the defendants, Fred A. Seaton, Secretary of the Interior of the United States, Philip Young, Chairman, George M. Moore, and Frederick J. Lawton, Members of the Civil Service Commission of the United States and move this Court to dismiss this action on the ground that the Court lacks jurisdiction to entertain this suit;

In the alternative, defendants move for summary judgment on the ground that there is no genuine issue as to any material fact, and that defendants are entitled to judgment as a matter of law.

In support of this action, the Court is respectfully referred to the exhibits attached to this motion and to defendants' memorandum of points and authorities filed herewith.

/s/ George Cochran Doub, Assistant Attorney General, /s/ Edward M. Hickey, Attorney, Department of Justice, /s/ Donald B. MacGuineas, Attorney, Department of Justice, /s/ Beatrice M. Rosenhain, Attorney, Department of Justice.

EXHIBIT "A" TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

NOTIFICATION OF PERSONNEL ACTION.

1. Name:	2. Date of birth:	4. Date:
Mr. William V. Vitarelli	10-21-10	9-15-52

5. Nature of Action:	6. Effective Date:
Excepted Appointment	9-10-52

7. Civil Service or Other Legal Authority:
C.S. Reg. 6.101(h) Schedule A

[fol. 41] 8. Position Title: Education & Training Specialist

9. Service, series, Grade, Salary: GS-1710-11, $5940 p/a

10. Organizational Designations: Department of Interior, Trust Territory of the Pacific Is. Education Department.

11. Headquarters: Koror, W. Caroline Islands

12. Field or Dept'l.: Field

13. Veteran's Preference: None

14. Position Classification Action: 4088

15. Sex: Male 16. Appropriation: Govt of Trust Territory

18. Subject to C.S. Retirement Act; Yes

19. Date of Appointment Affidavits: 11-8-51

20. Legal Residence: State—Pennsylvania

21. Remarks: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or cancelled if not in accordance with all requirements.

plus 25% Territorial Post Differential as authorized by OSC in accordance with E.O. 10,000.

You are subject to a 2 year employment agreement.

This appointment does not confer competitive Civil Service Status.

Standard Form 61 completed--85 and 87 not required.

/s/ Nat Logan Smith, Personnel Director

Entrance Efficiency Rating:
Satisfactory

[fol. 42] TRUST TERRITORY OF THE PACIFIC ISLANDS
OFFICE OF THE HIGH COMMISSIONER
3845 Kilauea Avenue,
Honolulu 16, Hawaii

EMPLOYMENT AGREEMENT

Position — Education & Training Spec.
Pay — GS-11, $5940 p/a plus 25% TPD

Duty Station Koror, Western Caroline Is.

Mr. William V. Vitarelli
c/o Civil Administrator
Koror, Western Caroline Islands

By your signature to this employment agreement you agree to serve for a period of twenty-four (24) months, *or such part thereof as your services may be needed.* This period will begin the date you are entered on the payroll.

You will be allowed per diem in lieu of subsistence while you are in travel status to your duty station. If you should delay your travel for your own personal reasons, per diem claims will not be honored for that period. Per diem may be reduced or eliminated under certain other circumstances in accordance with government travel regulations.

You are entitled to expenses of transportation of your immediate family and household effects from your place of actual residence to your duty station, subject to availability of housing. The weight of your household effects may not exceed the amount posted on your Travel Authorization. While your appointment is to the position shown on the personnel action form, you are subject to transfer or reassignment to any position for which you are qualified within the geographic area of the Trust Territory, at any time during the period of this agreement, provided there is no reduction in your pay. The rate of pay under which you are appointed is subject to such adjustment as may occur at any time during the period of your employment by operation of law, promulgation of a revised schedule of wages or by reallocation of your position.

[fol. 43] Upon completion of service specified in this agreement you may either accept return transportation for you and your dependents or you may continue to serve for a longer period, and accept transportation at the close of that period.

During the period of this agreement should unforeseen emergency arise in the nature of serious illness or death of a member of your immediate family (father, mother, husband, wife, or children) which requires your immediate presence, the High Commissioner is authorized at your request to terminate your employment and furnish you with transportation to point of recruitment in the United States. The High Commissioner shall request verification of the existence of the emergency by the American Red Cross, or other equally appropriate agency.

Should your health become so impaired through no fault of your own during the period of this employment as to justify your return to the United States, based upon examination and report of a medical officer of the Trust Territory, you will be returned at the expense of the Government to the place from which appointed.

The Trust Territory of the Pacific Islands agrees that it will have no further claims on you for the funds expended under this agreement if you fulfill its terms, or are involuntarily removed without delinquency or misconduct from employment by action of the Trust Territory at any time subsequent to the date of entry on duty.

E. D. Thomas
High Commissioner
Trust Territory of the Pacific Islands

I agree that if I fail to fulfill the terms of this employment agreement by resigning, vacating the position without authority, or if I am removed for cause before the expiration of the period of this agreement, I will, upon demand, repay to the Trust Territory of the Pacific Islands a sum of money equivalent to that expended for my transportation and subsistence and transportation of dependents and cost of shipment of household effects from beginning point of travel to duty station. I authorize the Trust Territory to withhold

[fol. 44] any final pay due me to apply against or to liquidate any indebtedness arising from a violation of this employment agreement. Further, I understand and agree that in this event return transportation to the United States at Government expense will not be furnished.

/s/ William V. Vitarelli
(Signature of Appointee)

.....
(Date)

[Filed October 1, 1956]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

September 2, 1954

Personal

In the Matter of	)	
	)	
William Vincent Vitarelli,	)	FINDINGS AND FINAL
a suspended employee.	)	DETERMINATION
	)	

The above matter coming on regularly this day for final disposition, and being well advised in the premises, the Secretary of the Interior finds as follows:

1. That the information obtained on and about William Vincent Vitarelli pursuant to Executive Order 10450 was of the nature and character that justified further examination under the terms of the Executive Order and Departmental Order No. 2738.

2. In accordance therewith and by direction and authority vested in the Secretary of the Interior by the Act of August 26, 1950 (Public Law 733, 81st Congress), charges were preferred against the employee setting forth as specifically as security considerations permitted the nature of his conduct and he was suspended from employment with the Office of Territories without pay as of April 2, 1954, the

Secretary of the Interior then and there having deemed such action necessary in the interest of national security.

[fol. 45] 3. In said letter of charges and suspension, the employee was duly notified of his privilege to submit statements and affidavits to show why he should be reinstated or restored to duty. That such statements and affidavits were submitted by the employee within the time allowed and they were duly considered. Thereafter, by letter from the Secretary of the Interior dated June 11, 1954, the employee was notified that the contents of the statements and affidavits were not deemed sufficient to justify his reinstatement to duty and the matter was set for hearing on June 22, 1954.

4. That the hearing was held on said date before a duly constituted agency authority of three disinterested employees of other agencies than the Department of the Interior. The employee was present in person and represented by counsel and was fully advised of all his rights and privileges.

5. That the said hearing board thereafter considered the entire record and recommended, on August 26, 1954, "that the employment of William Vincent Vitarelli is not clearly consistent with the interests of national security." That the recommendation addressed to the Secretary of the Interior was accompanied by the required memorandum of reasons.

6. That the case has been carefully reviewed by me and by other officers of this Department designated by me.

7. That I find it advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954.

It Is, Therefore, Determined and Ordered that the employment of William Vincent Vitarelli, an employee of this Department of the Interior, be, and the same is hereby, terminated in the interest of the national security at the close of business on September 10, 1954.

[fol. 46] A copy of this order shall be sent by registered mail to the employee and the proper officials of the Department shall be notified for appropriate action in accordance with this order.

/s/ Douglas McKay
Secretary of the Interior

Date: Sept. 2, 1954

[Filed October 1, 1956]

NOTIFICATION OF PERSONNEL ACTION

1. Name: Mr. William V. Vitarelli 2. Date of Birth: 10-21-10
4. Date: 9-21-54 5. Nature of Action: Termination
6. Effective Date: 9-10-54 7. Civil Service or Other Legal Authority: C. S. Reg. 6.101(h) Schedule A
8. Position Title: Education Officer (General)
9. Service Series: GS-1710-11, $5940 p/a
10. Organizational Designations: Department of the Interior, Trust Territory of the Pacific Is., Education Department, Administrative
11. Headquarters: Koror, W. Caroline Islands
12. Field or Dept'l.: Field. 13. Veteran's Preference: None
14. Position Classification Action: PD No. 4088
15. Sex: Male 17. Appropriator: Govt. of Trust Territory
18. Subject to C.S. Retirement Act: Yes.
20. Legal Residence: Pennsylvania (State)
21. Remarks: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service

Commission. The action may be corrected or cancelled if not in accordance with all requirements.

*plus 25% TPD as authorized by the CSC in accordance with E. O. 10,000.

This action is being taken in accordance with the provisions of

Executive Order 10450.

Date of original appointment: 9-10-52

Recruited from: New York City, New York

Transportation furnished to point of recruitment at Government expense.

[fol. 47] [Filed October 10, 1956]

Affidavit of Juanita Vidi, Personnel Officer, Office of Territories, Department of the Interior, in support of Defendants' Opposition to Plaintiff's Motion for Summary Judgment.

[Filed October 10, 1956]

I, Juanita Vidi, do hereby certify that I am Personnel Officer, Office of Territories, and that the personnel file of William Vincent Vitarelli is presently in the custody of the Office of Territories, Department of the Interior. I further certify that the Standard Form 50 attached hereto and made a part hereof is a true copy of the official document reflecting the termination of William Vincent Vitarelli from a position under the jurisdiction of the said Office of Territories.

/s/ Juanita Vidi
Personnel Officer
Office of Territories

[JURAT]

NOTIFICATION OF PERSONNEL ACTION

1. Name: Mr. William V. Vitarelli 2. Date of Birth: 10-21-10

4. Date: 9-21-54 5. Nature of Action: Termination

6. Effective Date: 9-10-54 7. Civil Service or Other Legal Authority: C.S. Reg. 6.101(h) Schedule A

8. Position Title: Education Officer (General)

9. Service, Series, Grade: GS-1710-11 $6140 p/a*

10. Organizational Designations: Department of the Interior Trust Territory of the Pacific Is. Education Department, Administrative

11. Headquarters: Koror, W. Caroline Islands

12. Field or Dept'l.: Field.

[fol. 48] 13. Veteran's Preference: None

14. Position Classification Action: PD No. 4847

15. Sex: Male 17. Appropriation: Govt of Trust Territory

18. Subject to C.S. Retirement Act: Yes

20. Legal Residence (State): Pennsylvania

21. Remarks: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or cancelled if not in accordance with all requirements.

*Plus 25% TDP as authorized by the CSC in accordance with E.O. 10,000.

Date of original appointment: 9-10-52

Recruited from: New York City, New York.

Transportation furnished to point of recruitment at Government expense.

This Form 50 is a revision of and replaces the original bearing the same date.

Entrance Performance Rating: Excepted Status

[Filed October 10, 1956]

AFFIDAVIT

City of Washington:
District of Columbia: ss

William C. Hull, Executive Assistant to the United States Civil Service Commissioners, being first duly sworn according to law deposes and says:

1. That he has legal custody and control of the records of the Civil Service Commission.

2. That all records of the said Commission have been expunged of all adverse findings made with respect to Mr. [fol. 49] William Vincent Vitarelli under Executive Order 10450.

/s/ William C. Hull

[JURAT]

IN THE UNITED STATES DISTRICT COURT

Excerpts of Proceedings

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Well, what disturbs me about the thing is that if he could be separated from the service simply upon the direction of the Secretary of the Interior, how this Court can order that he be reappointed or reemployed.

Mr. Hynning: I think this Court can order him reinstated or restored to duty. I think the Secretary of the Interior the next day can terminate him or that same day; but that is a termination, sir, that speaks as of that day, not a termination that speaks of September, 1954.

Now in the Haynes case, the court was dealing with a probation employee. It is true that the Government made the argument in its petition for rehearing to the Court of Appeals that if had misread the law, in the light of Cole v. Young, but that argument didn't persuade the Court of Appeals as recently, I believe, as September of this year, after Cole v. Young had been decided and after the Government had argued that its decision was in error. The court let its earlier decision stand. So I submit that Haynes v. Thomas is the law for this circuit, and under that case, a probationary employee, who, of course, could be let go for no reason at all—for no reason at all—during that period, was ordered reinstated.

I submit that a Schedule A employee who was terminated with the wrong procedure and the wrong reasons, and with dreadful consequences to himself and his family, who is being held up with "a badge of infamy," is entitled to reinstatement if the original proceeding was unlawful.

[fol. 50] The Court: Well, I am not persuaded that this Court has the right to direct the Government to reinstate someone who could clearly be separated from the service. That is the point that bothers me.

Mr. Hynning: He could be separated after he was restored. Now the Government has conceded that his original removal was unauthorized. They have bungled——

Mr. MacGuineas: I am sorry, that is not a correct statement of my position.

The Court: No, I don't think they have conceded it was unauthorized. They have conceded it was not authorized by the Security Act, but they haven't conceded that they didn't have a right to except him from the service.

Mr. Hynning: I accept the correction. I should have said it was not authorized under the authority that was purported to be used.

The Court: That, I think, is correct.

Mr. Hynning: Now they bungled at reaching the next conclusion, that if the authority they used and the authority that has been mentioned in this case up until September of this year is the improper authority, I think it follows, as a matter of logic that that removal was unauthorized and, therefore, unlawful. The fact that they had some other

authority which they could have used but didn't, is conjectural, hypothetical and, as they have said, immaterial in this case.

Now that appears in their document in answer to my argument in favor of discovery. On that point I am in complete accord. The fact that they had the authority to act in a lawful manner, I think, is irrelevant if they didn't so act. I think this Court is concerned only with what happened when Dr. Vitarelli was removed, and what happened there was that he was removed under an authority which did not exist and a procedure which was unauthorized.

[fol. 51]. The Court: I am sympathetic somewhat to the plaintiff in this case, but I really don't see how this Court has the right to say that he shall be reinstated when the Secretary had the right to terminate his services, even if he terminated them for a wrong reason.

Mr. Hynning. Well, sir, it seems to me that that was the precise issue confronting the Court of Appeals for this circuit in Haynes v. Thomas.

The Court: Haynes v. Thomas was decided before Cole v. Young.

* * * * * * *

The Court: It does look to me like counsel could get together on the wording of an order that would carry into effect my ruling and at the same time point out that the removal—he was removed as a security risk, wasn't he?

Mr. MacGuineas: Yes, that is my point, and I don't want to give the Court of Appeals, if the case gets there, any contrary impression from any wording of an order of Your Honor's.

The Court: Well, he couldn't be removed as a security risk under the provisions that he was removed under.

Mr. MacGuineas: The authority for doing so was not the act of 1950, but there was authority for doing that under the general dismissal authority. That was our whole proposition on the case, which I understand Your Honor agreed with. In other words, under the general power of removal, he could be dismissed for any reason whatever, be it security or non-security or anything.

Mr. Hynning: I agree completely with counsel for the Government that that could have been done, but it wasn't.

As I understood the ruling of this Court, it was that he was an employee at will and that an employee at will, removed for the wrong reason and the wrong procedure, still is without a remedy, as far as reinstatement is concerned, because if he were restored, he could be fired that very same day.

[fol. 52] The Court: That is right.

Mr. Hynning: That is what I understood to be the rationale of this Court's ruling. I have endeavored to state that.

* * * * * * *

IN THE UNITED STATES DISTRICT COURT

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, ETC.—Filed October 29, 1956

This cause having been heard on cross motions of plaintiff and defendants for summary judgment; and it appearing that the removal of plaintiff as a "security risk" under the Act of August 26, 1950 (5 U. S. C. 22-1) has been conceded by the defendants not to have been authorized under that act; that the defendants have taken all practical steps, short of reinstating plaintiff or giving him back pay, to remove the stigma, if any, which may have resulted from his removal by expunging from the records of the Department of the Interior and the Civil Service Commission all adverse statements with respect to plaintiff as a "security risk" under Executive Order 10450; that the position to which plaintiff seeks reinstatement was and is a "Schedule A" position, which is excepted from the competitive civil service and from which plaintiff could be summarily removed with or without cause under the general authority of the executive branch to appoint and remove employees excepted from the competitive civil service; and that this Court cannot order the reinstatement of plaintiff whose tenure, as a "Schedule A" employee, is only at the will of the employing Government;

Now, Therefore, It Is Hereby Ordered that plaintiff's motion for summary judgment is denied; defendants' motion for summary judgment is granted; and the complaint is hereby dismissed.

/s/ James W. Morris, District Judge.

Dated: October 29, 1956

Seen: /s/ Clifford J. Hynning, /s/ D. M. MacGuineas.

[fol. 53] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13702

WILLIAM VINCENT VITARELLI, Appellant,

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL., Appellees.

Appeal from the United States District Court
for the District of Columbia

Mr. Clifford J. Hynning for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom Assistant Attorney General Doub, and Mr. Paul A. Sweeney, Attorney, Department of Justice, were on the brief, for appellees.

Before FAHY, WASHINGTON and DANAHER, Circuit Judges.

OPINION—Decided February 13, 1958

WASHINGTON, Circuit Judge: This is a suit by a former Government employee, seeking reinstatement and declaratory relief.

Plaintiff-appellant occupied a position in the Department of the Interior, designated "Education and Training Specialist," which was excepted from the classified civil service. In early 1954, after some three years of employment, he was suspended by the Secretary of the Interior on charges (among other things) (1) that he was a member of, affili- [fol. 54] ated with, or in sympathetic association with, the Communist Party, (2) that his behavior, activities and associations tended to show that he was not reliable or trustworthy, and (3) that he had "deliberately misrepresented, falsified or omitted material facts" in answering, under oath, questions addressed to him in 1952 by the Interior Department Loyalty Board. The charges were purportedly made pursuant to the Act of August 26, 1950, 5 U.S.C. § 22-1 (1952), and Executive Order No. 10,450, 18 Fed. Reg. 2489 (1953). Plaintiff-appellant filed an answer, together with some forty-four affidavits. He was given a hearing before a Security Hearing Board. Appellant was present in person, and had the services of counsel. He was not confronted with any witnesses. Certain confidential information was not disclosed to him. At the hearing, the Government attorney stated that appellant was not charged with disloyalty, and that the "question is only whether he is a security risk." Some weeks after the hearing, the Secretary of the Interior made findings sustaining the charges, and dismissed appellant. A rehearing was granted, and additional testimony taken. Reinstatement, however, was refused. Suit was then commenced in the District Court. The Government, as explained in the concluding paragraph of this opinion, thereafter issued a new notice of termination of appellant's employment, and expunged its records of adverse findings. Summary judgment was requested by the Government, and granted. This appeal followed.

Appellant's principal contention is that he must be reinstated because—as the Government admits—the position he occupied was not a sensitive one, and accordingly the Act of 1950 and Executive Order No. 10,450 could have no application to him, under the doctrine of *Cole* v. *Young*, 351 U.S. 536 (1956). The question is, then, whether *Cole* requires his reinstatement.

The decision of the Supreme Court in *Cole* was based on the traditional responsibility of the courts to insure that [fol. 55] Government employees sought to be dismissed are given the benefit of all procedural protections required by statute or regulation.[1] The Court laid down no general prohibition of dismissals on security or loyalty grounds. On the contrary, the Court said:

> "In interpreting the 1950 Act, it is important to note that the Act is not the only, nor even the primary, source of authority to dismiss Government employees. The general personnel laws—the Lloyd-LaFollette and Veterans' Preference Acts—authorize dismissals for 'such cause as will promote the efficiency of the service,' and the ground which we conclude was the basis for petitioner's discharge here—a reasonable doubt as to his loyalty—was recognized as a 'cause' for dismissal under those procedures as early as 1942. . . . Thus there was no want of substantive authority to dismiss employees on loyalty grounds, and the question for decision here is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case." (pp. 543-44) (Emphasis in original.)

The inquiry in *Cole* was, therefore, a procedural one. The plaintiff in that case was a veteran. Notwithstanding that fact he was denied the protections and procedures of the Veterans' Preference Act. The Supreme Court held

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[1] See also Service v. Dulles, 354 U.S. 363 (1957) (non-compliance with regulation); Peters v. Hobby, 349 U.S. 331 (1955) (non-compliance with Executive Order No. 9,835). For examples in this court see Kerr v. Barnes, 100 U.S.App.D.C. 51, 242 F.2d 24 (1956); Kutcher v. Higley, 98 U.S.App.D.C. 278, 235 F.2d 505 (1956); Haynes v. Thomas, 98 U.S.App.D.C. 131, 232 F.2d 688 (1956); Burrell v. Martin, 98 U.S.App.D.C. 33, 232 F.2d 33 (1955); Flanagan v. Young, 97 U.S.App.D.C. 119, 228 F.2d 466 (1955); Mulligan v. Andrews, 93 U.S.App.D.C. 375, 211 F.2d 28 (1954); Money v. Anderson, 93 U.S.App.D.C. 130, 208 F.2d 34 (1953). See also Powell v. Brannan, 91 U.S.App.D.C. 16, 196 F.2d 871 (1952), and cases cited.

that he should have been given the benefits of that Act and [fol. 56] remanded the case to the District Court for appropriate proceedings. Similarly, in *Service* v. *Dulles*, 354 U.S. 363 (1957), the dismissed employee was an officer in the Foreign Service of the United States "and as such was entitled to the protection of the Foreign Service Act of 1946, as amended. 22 U.S.C. § 801, *et seq.*" 354 U.S. 371 at n. 12. As the Supreme Court pointed out, the procedures required by that Act were not afforded to him. When the Supreme Court held that the action which the Government had taken in an effort to dismiss Service was invalid, it thus became clear (as was true in *Cole*) that if the Government wished to press its charges once more it must do so under the required statutory procedure. In the case at bar the petitioner had no prescribed tenure of office and is not a veteran, nor a member of the Foreign Service, nor in any other specially-protected group. He is not a member of the classified civil service and accordingly is not entitled to such protection as the Lloyd-LaFollette Act gives. 37 Stat. 555 (1912), 5 U.S.C. § 652 (1932). Nor, of course, is he entitled to the procedural protections provided by the Act of August 26, 1950, which has no application to him.[2]

Persons situated as was the appellant are, we may assume, entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds. *Wieman* v. *Updegraff*, 344 U.S. 183, 191, 192 (1952); *McGinty* v. *Brownell*, — U.S.App.D.C. —, 249 F.2d 124 (1957). But [fol. 57] no such dismissal occurred here. Dismissal on loyalty or security grounds certainly is not unconstitutional *per se;*

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[2] Where the Executive extended—by Executive Order No. 10,450—the provisions of the 1950 Act to employees in sensitive positions who might not, under that Act standing alone, be entitled to the procedural protections outlined in the Executive Order, this court held the Government to observance of those protections. Haynes v. Thomas, *supra* note 1 (probationary employee in Navy Department held entitled to protections of Executive Order No. 10,450). But where, as here, the employee is not in a position declared sensitive, the 1950 Act and the Executive Order are inapplicable to him, under the rule in *Cole*. The decision in Service v. Dulles, *supra* note 1, relied on by appellant, is not pertinent unless statutes or regulations "were indeed applicable and were violated." 354 U.S. at 373.

the Supreme Court's language in *Cole* refutes any contention of that sort.[3] And the treatment accorded appellant was in no way arbitrary, or lacking in due process. He was given written charges, and an opportunity to answer them, together with a hearing. This was more than he was entitled to under any statute or regulation applicable to persons of his employment status.

It is true, as appellant urges, that an administrative order "cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943).[4] But, as the Supreme Court made clear in the second *Chenery* case, the courts will disturb the agency's conclusion "only if it lacks *any* rational and statutory foundation." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947). (Emphasis supplied.) In this case there was clearly a "rational" foundation for the Secretary's [fol. 58] dismissal of appellant. There was also a sufficient "statutory" foundation—the constitutional power of the Executive to dismiss subordinates: a power not limited in the present instance by statute or regulation.[5]

For these reasons, we find that appellant was legally discharged, even though the proceedings were improperly

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[3] This court has said: "It is our clear opinion that the President, *absent congressional restriction*, may remove from Government service any person of whose loyalty he is not completely convinced." Bailey v. Richardson, 86 U.S.App.D.C. 248, 267, 182 F.2d 46, 65, *affirmed by an equally-divided court*, 341 U.S. 918 (1951). (Emphasis added.)

In *Cole* and *Service* the Supreme Court held that there were "congressional restrictions" on dismissal which the Government had failed to observe. In the instant case there were no such restrictions.

[4] We recently applied that rule where the Secretary of State relied exclusively on a particular regulation in denying a passport to an applicant, but failed to make the findings which that regulation required. Boudin v. Dulles, 98 U.S.App.D.C. 305, 235 F.2d 532 (1956).

[5] See footnotes 2 and 3, *supra*.

labelled as being brought under the authority of the Act of 1950 and Executive Order No. 10450. He was not deprived—in contrast to the situation in *Cole* and *Service*—of any procedural right or protection to which he was entitled. It may be noted, too, that one of the grounds of dismissal furnishes a clear basis for the Secretary's action, quite apart from the questions raised by the appellant. Charge 3 against appellant reads as follows:

> "3. Your behavior, activities and associations tend to show that *you are not reliable or trustworthy*, and the facts above alleged furnish reason to believe that *you have deliberately misrepresented, falsified or omitted material facts* in connection with your said behavior, activities and associations, and these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security." (Emphasis added.)

The charge of untrustworthiness and deliberate misrepresentation was found by the Secretary of the Interior to have been sustained on the evidence before him.

There is no basis on which we can weigh the evidence, or conclude that the Secretary's action in dismissing appellant could not properly be rested on that ground. The power of the Executive to discharge for untrustworthiness or deliberate misrepresentation is beyond dispute, even under the here inapplicable Lloyd-LaFollette and Veterans' Preference Acts. See *Williams* v. *Cravens*, 93 U.S.App.D.C. 380, 381, 210 F.2d 874, 875, cert. denied sub nom. *Williams* [fol. 59] v. *Robbins*, 348 U.S. 819 (1954); *Kohlberg* v. *Gray*, 93 U.S.App.D.C. 97, 207 F.2d 35 (1953), cert. denied, 346 U.S. 937 (1954). And, so long as one of the grounds announced appears rational and proper, courts have refused to review the evidence or to examine the merits of the

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[1] See Devine v. Campbell, 90 U.S.App.D.C. 171 at 174, 194 F.2d 876 at 879, *cert. denied*, 344 U.S. 826 (1952). *Cf.* Kuhn v. Civil Aeronautics Board, 87 U.S.App.D.C. 130, 183 F.2d 839 (1950). The circumstance that the third ground of dismissal was intimately related to the first two grounds would seem immaterial here.

executive officer's finding.[7] It is not our function to decide whether appellant was or was not untrustworthy, or a "security risk."

An additional point remains. Appellant asserts that the Secretary's action illegally fastened upon him a "badge of infamy," which can be removed only by his reinstatement. We think, however, that the Secretary's mistaken reliance on the Act of 1950 and Executive Order No. 10,450 does not require the relief appellant asks. The record shows that appellant's notice of termination, as originally issued, stated that action was "being taken in accordance with the provisions of Executive Order 10450." But, two years later, after suit had been brought in the District Court, a new notice was issued which omitted the quoted statement. An affidavit was also filed by an official of the Civil Service Commission stating that "all records of the said Commission have been expunged of all adverse findings made with respect to Mr. William Vincent Vitarelli under Executive Order 10450." We think that this voluntary action by the Government is equivalent to the maximum relief a court [fol. 60] might have been justified in granting under all the circumstances of the case. See *Peters* v. *Hobby*, 349 U.S. 331, 349 (1955); *Service* v. *Dulles*, 98 U.S.App.D.C. 268, 272, 235 F.2d 215, 219 (1956), rev'd on other grounds, 354 U.S. 363 (1957).

Affirmed.

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[7] Kent v. United States, 177 U.S. 290 (1900); Eberlein v. United States, 257 U.S. 82 (1921); Levine v. Farley, 70 App.D.C. 381, 107 F.2d 186 (1939), *cert. denied*, 308 U.S. 622 (1940); Carter v. Forrestal, 85 U.S.App.D.C. 53, 175 F.2d 364, *cert. denied*, 338 U.S. 832 (1949).

FAHY, Circuit Judge, dissenting: The original termination action of the Secretary, effective September 10, 1954, was explicitly rested by him upon Executive Order 10450,[1] which in turn rested upon the Act of August 26, 1950.[2] This appears upon the face of the Secretary's "Findings and Final Determination" and from the "Notification of Personnel Action."

I cannot read Charge 3, referred to by the majority, or any finding of the Secretary based thereon, as in any sense independent of executive Order 10450 or the Act of August 26, 1950.

It is conceded that under the decision of the Supreme Court in *Cole* v. *Young*, 351 U.S. 536, said Executive Order and Act did not authorize the Secretary's action in this case. Accordingly, the basis for the original termination disappears, and with it the validity of that termination.

On October 12, 1956, a second "Notification of Personnel Action" was delivered to appellant. This in terms purported to terminate the employment as of the date of the original termination, September 10, 1954, and was not based upon Executive Order 10450 or the Act of August 26, 1950. But this action of course could not relate back as attempted, and at most could be effective only as of the time it was taken, October 12, 1956.

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[1] 18 Fed. Reg. 2489 (1953).

[2] 64 Stat. 476, 5 U.S.C. § 22-1 (1952).

[fol. 61]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13702 January Term, 1958.

C. A. 2870-56

WILLIAM VINCENT VITARELLI, Appellant,

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL., Appellees.

Appeal from the United States District Court for the District of Columbia.

Before: FAHY, WASHINGTON and DANAHER, Circuit Judges.

JUDGMENT—February 13, 1958

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: Feb. 13, 1958

Per Circuit Judge Washington.

Separate dissenting opinion by Circuit Judge Fahy.

[fol. 63] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 64]

SUPREME COURT OF THE UNITED STATES

No. 1067, October Term, 1957

WILLIAM VINCENT VITARELLI, Petitioner,

vs.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 5, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 13th, 1958.

Earl Warren, Chief Justice of the United States.

Dated this 5th
day of May, 1958.

[fol. 65]

SUPREME COURT OF THE UNITED STATES

No. 101, October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—October 27, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 66]

SUPREME COURT OF THE UNITED STATES

No. 101, October Term, 1958

[Title omitted]

ORDER OF SUBSTITUTION—November 17, 1958

On Consideration of the motion to substitute Barbara Bates Gunderson as a party respondent in the place and stead of Christopher H. Phillips in this case,

It Is Ordered by this Court that the said motion be, and it is hereby, granted.

November 17, 1958

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